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758095—47

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 241

W. W. WATTS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 256–261) is reported at 161 F. 2d 511.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 13, 1947 (R. 261). A petition for rehearing was denied June 13, 1947 (R. 265). On July 7, 1947, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to August 6, 1947 (R. 266). The petition for a writ of certiorari was filed on August 2, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended

by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the judge's charge, in which petitioner acquiesced at the trial, adequately instructed the jury on the elements of the offense.

2. Whether petitioner was denied a fair trial because the judge ruled on certain preliminary motions immediately after hearing argument thereon.

3. Whether the evidence is sufficient to support the verdict.

STATUTES AND REGULATIONS INVOLVED

The Emergency Price Control Act of 1942, as amended, 56 Stat. 23, 58 Stat. 632, 59 Stat. 306, 60 Stat. 664 (50 U. S. C. App., Supp. V, Section 901, *et seq.*) provides in pertinent part:

> SEC. 2. (a) Whenever in the judgment of the Price Administrator * * * the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and effectuate the purposes of this Act.
>
> SEC. 4. (a) It shall be unlawful * * * for any person to sell or deliver any commodity, * * * in violation of any regulation or order under section 2 * * *.
>
> SEC. 205. (b) Any person who willfully

violates any provision of section 4 of this Act * * * shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment for not more than two years in the case of a violation of section 4 (c) [relating to the disclosure or use for personal benefit of official information by government officers] and for not more than one year in all other cases, or to both such fine and imprisonment. * * *

(d) No person shall be held liable for damages or penalties in any Federal, State, or Territorial court, on any grounds for or in respect of anything done or omitted to be done in good faith pursuant to any provision of this Act or any regulation, order, price schedule, requirement, or agreement thereunder, or under any price schedule of the Administrator of the Office of Price Administration or of the Administrator of the Office of Price Administration and Civilian Supply, notwithstanding that subsequently such provision, regulation, order, price schedule, requirement, or agreement may be modified, rescinded, or determined to be invalid. * * *

Maximum Price Regulation 540 issued June 10, 1944 (9 Fed. Reg. 6434), as amended, provides in part:

§ 1 (a) [as amended January 14, 1946, 11 Fed. Reg. 491] * * * (1) *Definition of used passenger automobile* (*"used car"*).

"Used passenger automobile" (called "used car" in this regulation) means any passenger automobile having a seating capacity of less than eleven persons which has been used for any purpose and the chassis or body of such an automobile * * *.

§ 2 [as amended September 6, 1945, 10 Fed. Reg. 11556] *Prohibition against dealing in used cars at prices above the maximum.* (a) On and after July 10, 1944, regardless of any contract or other obligation, except as provided in paragraphs (b), (c) and (d).

(1) No person shall sell or deliver any used car at a price higher than the maximum price permitted by this regulation except as provided in paragraph (d) * * * [relating to repossession of financed cars after default].

STATEMENT

On September 26, 1946, an indictment in three counts was returned against petitioner in the United States District Court for the Southern District of Texas, charging violations of the Emergency Price Control Act and the 1946 extension thereof, and Maximum Price Regulation 540 issued pursuant thereto, by the sales of three automobiles at above ceiling prices (R. 3–5). On October 7, 1946, petitioner moved to dismiss the indictment on the ground, *inter alia,* that it failed to allege that the overcharges were willful (R. 6–8). The motion was granted on October 8 (R. 8). On October 9, the United States At-

torney filed an information which repeated the charges of the indictment with the addition of the word "willful," and added a fourth count charging another offense (R. 9–11). On the afternoon of that day, petitioner moved to postpone arraignment for ten days, pointing out that the fourth count contained a new charge, and also alleging that he believed the indictment had been returned under conditions disclosing disqualification of some grand jurors, and that such disqualifications would vitiate the information as well (R. 12–14). When the court stated that it thought the motion should be granted because of the new charge in the fourth count, the United States Attorney moved to dismiss that count, and the motion was granted (R. 33, 40–41). Petitioner also sought a bill of particulars (R. 14–16), moved to dismiss the information on the ground that it was merely an amendment of an indictment and that it was too vague and indefinite (R. 15–16), and applied for leave to file in the Emergency Court of Appeals a complaint attacking the constitutionality of the Emergency Price Control Act and the 1946 extension (R. 20–21). The motions were denied (R. 16–18, 21), and the case proceeded to trial. Petitioner was acquitted on the first count and convicted on the second and third counts (R. 22–23). A motion for a new trial was denied (R. 27–29), and petitioner was sentenced to imprisonment for one year and to

pay a fine of $1,000 on each count, the prison sentences to run concurrently (R. 24–26). The Circuit Court of Appeals for the Fifth Circuit affirmed (R. 256–261).

The evidence for the Government on the second and third counts may be summarized as follows:

On August 5, 1946, Charles T. Jackson, Jr., purchased a 1939 Chevrolet Tudor Town Sedan for $995, making a down payment of $560 (R. 61, 110). Jackson first made arrangements for the purchase with a salesman at petitioner's used car lot (R. 62, 108–109). When Jackson was about to make the down payment, petitioner came into the office and said that he could not accept a check for $560, but would take a check for $245 and the balance in cash (R. 62–63, 110). Jackson, who was accompanied by his father and mother, then said that he would make the entire down payment in cash (R. 63–64, 110). Jackson and his parents went to their bank, and Jackson drew out $500 in cash, and his mother drew out $60 (R. 64–66, 129). They then returned to petitioner's lot and paid $560 in cash to petitioner (R. 66, 111). Petitioner gave Jackson a receipt which listed the price of the car as $680 plus $15 for license and taxes, and showed a down payment of $245, leaving $450 to be financed (R. 66, Gov. Ex. 2, R. 68). The salesman had told Jackson that he would fix the lights, horn and speedometer

which were not in working order at the time Jackson tried out the car, but neither the salesman nor petitoner gave Jackson a written or oral warranty for 30 days after the sale or for the first thousand miles (R. 71–73, 111–112). About a week after the purchase, when Jackson and his father brought the car around to have the horn and speedometer fixed, Jackson's father called petitioner's attention to the discrepancy of $315 between the amount listed as the down payment in the invoice and the actual amount paid, pointing out that Jackson, who intended to use the car for business purposes, would be obliged to pay an income tax on that $315. Petitioner agreed to repay Jackson 10 percent of the amount toward the income tax liability, and gave him a check for $31.50 (R. 102–103, 112–113). The ceiling price on a Chevrolet 1939 Tudor Town Sedan sold on August 5, 1946, without warranty was $543.83 (R. 134, 136–137).

W. L. Lybarger purchased a 1940 six-cylinder four-door "deluxe" Pontiac from petitioner on August 10, 1946, for $960. The ceiling price for such a car at that time was $816.83 (R. 168). Lybarger turned in a 1936 Ford Tudor for which he received an allowance of $350; the balance of $610 was financed (R. 141–147, 166). He received no written or oral warranty from either petitioner or petitioner's salesman (R. 148). Petitioner stated that he would not give any

guaranty on the car because he was selling it for a friend (R. 148–149). Two days after he purchased the automobile, Lybarger paid $41.20 for repairs (R. 148).

In his charge, the judge stated that there were three elements which the jury had to find beyond a reasonable doubt in order to convict on each of the counts—first, that petitioner sold the automobile in question; second, that he sold it at a price above ceiling; and third, that he sold it above ceiling willfully (R. 246). The judge defined "willful" as "that which is intentional, or knowing, or voluntary, as distinguished from accidental. In other words, it is something knowingly done, or intentionally done, or voluntarily done" (R. 248).

After completing his charge, the judge asked if there were any objections or suggestions, and the counsel for both sides said that there were none (R. 248).

ARGUMENT

1. Petitioner's principal contention (Pet. 11, 13–16, 18–19, 20–26) is that the judge failed adequately to instruct the jury on the elements of the offense in that he did not tell them that petitioner could not be found guilty unless they found that his acts were not performed in good faith. Petitioner argues that he was entitled to such an instruction under Section 205 (d) of the Emergency Price Control Act (*supra*, p. 3),

which provides that no one shall be subject to penalties for acts performed in good faith under a regulation, even though such regulation may subsequently be declared invalid. But that provision has no relation to this case, since petitioner did not claim that he acted in good faith under a regulation later found invalid.

The statute does provide in Section 205 (b) that only "willful" violations of a regulation shall be subject to criminal prosecution. As set forth in the Statement, the judge specifically instructed the jury to such effect, and then went on to define "willful" as being deliberate and intentional as against accidental or inadvertent. This satisfies the requirements of Section 205 (b). *Kempe* v. *United States,* 151 F. 2d 680, 688 (C. C. A. 8); *Zimberg* v. *United State,* 142 F. 2d 132, 137 (C. C. A. 1), certiorari denied, 323 U. S. 712; *Gomila* v. *United States,* 159 F. 2d 1006, 1009 (C. C. A. 6), certiorari denied June 2, 1947, No. 1282, O. T. 1946. The judge also described the charge, defined the elements of the offense, gave the jury instructions on the presumption of innocence and the necessity of finding guilt beyond a reasonable doubt, and explained reasonable doubt (R. 244–246). The court below held that the charge did "fairly cover the vital and essential elements of the case" (R. 259), even though it was not "as detailed or explanatory as might have been desirable" (*ibid.*). Since the

offense was a simple one, the charge could properly be succinct. As this Court said of the charge in *United States* v. *Bayer*, decided June 9, 1947, No. 606, O. T. 1946, "the trial court was within its area of discretion in his brevity."

Since, therefore, the charge covered all the essential elements of the offense, it would not have been subject to attack, even if petitioner had objected thereto at the trial. *A fortiori*, his specific acquiescence in the charge when asked for suggestions by the trial judge, clearly bars him from attacking it now. Rule 30, F. R. Crim. P.; *Johnson* v. *United States*, 318 U. S. 189, 199–201.[1]

2. Petitioner's contention that he was denied a fair trial because of the denial of his motion to postpone arraignment and because the court disposed of his preliminary motions in short order (Pet. 11, 19, 27–33) is without substance. As has been stated, the judge indicated that he would grant the motion for postponement if the United States attorney intended to try the fourth count alleging a new charge, and he did not allow the

[1] Petitioner argues (Pet. 23) that the charge was also defective in failing to instruct the jury that they must find that the cars sold had been driven a thousand miles or more since such was the definition of used cars in M. P. R. 540. However, the definition which petitioner cites (Pet. 10, 12), was not the one in force at the time the offenses were committed. The definition was changed by amendment 12, effective January 14, 1946, 11 Fed. Reg. 491, to read as cited, *supra*, p. 4.

case to proceed to trial until the fourth count had been dismissed. Petitioner's other motions—to postpone arraignment pending investigation of unknown irregularities by the grand jurors in returning the dismissed indictment as a basis for attack on the information filed by the United States Attorney, and to stay the trial pending a general attack on the unconstitutionality of the Emergency Price Control Act,—were argued at some length before the court ruled thereon (R. 35–39, 43–47). The motions were clearly without merit and were given as much attention as they deserved.[2]

3. Petitioner's attack on the sufficiency of the evidence to support his conviction (Pet. 8–9, 12, 19, 33–34) is refuted by the facts set forth in the Statement, *supra*. The only specific defect in the evidence to which petitioner points is his contention that the proof did not relate to the same automobiles as were charged in the information in that the proof showed the sale to Jackson of a 1939 Chevrolet Tudor Town Sedan, whereas the information charged the sale of a 1939 Chevrolet Town automobile, and the proof showed the sale to Lybarger of a 1940 six-cylinder four-door deluxe Pontiac (R. 143), whereas the information charged the sale of a 1940 Pontiac four-door

[2] Petitioner's objection to the United States Attorney's reference in his brief in the circuit court of appeals to a prior conviction of petitioner (Pet. 31) obviously has no relevance to the validity of petitioner's trial.

automobile (Pet. 8–9). The insubstantiality of this argument need not be pressed further.

CONCLUSION

We respectfully submit that the petition for a writ of certiorari should be denied.

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